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IN THE

Supreme Court of the United States

October Term, 1962.

No. 256

IN RE ESTATE OF ANNIE E. HURST, DECEASED.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESIDUARY LEGATEES OF WINFRED HURST, AND THE COMMONWEALTH OF PENNSYLVANIA, IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Orphans' Court of Montgomery County (R. 811a-841a)[1] is unreported. The opinion of the Supreme Court of Pennsylvania (Pet. App. pp. 1a-6a) is reported at 406 Pa. 612 (1962).

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on March 13, 1962. Rehearing was denied on April 16, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

1. Throughout this brief in opposition, record references are to the printed record filed in the Supreme Court of Pennsylvania in **Estate of Annie E. Hurst, Deceased** (No. 68, January Term, 1961).

QUESTION PRESENTED.

Whether this Court will review the factual determination of the Orphans' Court of Montgomery County, Pennsylvania, and the Supreme Court of Pennsylvania, that petitioner exercised undue influence on Annie E. Hurst in the making of her will?

STATEMENT.

This is a will contest. Respondents are the Commonwealth of Pennsylvania, seeking an escheat of so much of the testatrix' probate estate as did not pass under her will, and certain residuary legatees of Winfred Hurst, the testatrix' son, who succeed to any of the appointive estate left to her by her son and not validly appointed in her will. Petitioner, Harry J. Alker, Jr., was the testatrix' scrivener and her attorney. The testatrix, Annie E. Hurst, in the disputed will of December 2, 1949, left $10,000 to her maid, $5,000 to her physician, and the balance of all her property, personal and appointive, approximately $56,000 to Alker (R. 3a).

The case was tried in the Orphans' Court of Montgomery County, upon respondents' appeal from the probate of the will. The trial lasted for nine days. The Court heard testimony from 24 witnesses, and received in evidence 13 exhibits. Respondents urged that Annie Hurst had no testamentary capacity on December 2, 1949, and that the gift to Alker was procured by Alker's undue influence. In consideration of all the evidence, the Orphans' Court, in a lengthy opinion, found that the testatrix did have testamentary capacity when she signed her will, but that she suffered a weakened mental capacity and that she had been subjected to undue influence by Alker, who had drawn the will. Accordingly, the Orphans' Court struck

down the will insofar as it benefited Alker, but upheld its other terms (R. 811a-841a).

Petitioner appealed to the Supreme Court of Pennsylvania. That Court, upon the submission of briefs and oral argument, reviewing both the facts and the law, unanimously affirmed the decision of the Orphans' Court. A subsequent petition for reargument was dismissed.

ARGUMENT.

This case turns on a question of fact—whether petitioner exerted undue influence upon Annie Hurst—and upon state law about which there is no dispute. Both the Orphans' Court and the Supreme Court of Pennsylvania found as a fact that petitioner did bring undue influence to bear, and this finding was supported by the overwhelming weight of the evidence. There is no occasion whatever for this Court's review of that finding by two courts. In apparent recognition of this fact, petitioner belatedly attempted, in his petition for reargument before the Supreme Court of Pennsylvania (Pet. App. 7a) to raise a federal question. There, for the first time, he asserted that the decision of the Pennsylvania courts violated the Fourteenth Amendment. Even assuming that he has timely raised a federal question, it is clear that his constitutional claim is merely a guise for requesting another evaluation of the facts.

1. We see no occasion here for a detailed review of all the evidence received and considered by the Pennsylvania courts. It is sufficient to note that petitioner's statement of the case falls far short of completeness. Petitioner bases his request for review by this Court on the claim that the Pennsylvania courts, in finding that he exerted undue influence on Annie Hurst, rejected his testimony arbitrarily, out of prejudice. In fact, his testimony was con-

tradicted on the record by a wealth of disinterested testimony, and his credibility was thoroughly impeached with extrinsic proof.

Alker testified that Mrs. Hurst's mental condition in 1949 was normal. His contact with her, however, had been minimal, and four of her neighbors, all disinterested, two close friends for many years, testified that Mrs. Hurst was incoherent and irrational throughout that and preceding years; she did not admit her sister's death (which occurred in 1946); when unattended, she wandered and was unable to find her way home; she spent hours sweeping phantom leaves; she often failed to recognize her son, with whom she lived until his death in November, 1949; she did not understand that her son had died, even at his funeral. These neighbors and friends categorically stated that Mrs. Hurst was completely incompetent to attend to her affairs in 1949 (R. 15a, 17a, 20a-26a, 30a-35a, 46a-48a, 86a, 88a-90a, 121a-124a, 127a-128a, 131a-132a, 155a, 200a, 202a).

Although Alker insisted that Mrs. Hurst was normal in December, 1949, he himself successfully applied for her admission as a mental patient to Marshall Square Sanitarium on June 20, 1950. He first denied that he had done so (R. 659a), then declared that he might have done so (R. 663a-664a), and finally said that, in any event, he did not know that the sanitarium was exclusively for the care of the mentally ill (R. 664a-671a). Alker's handwritten application for admission appears in the record (Props.' Ex. 3, R. 708a), together with his letter stating "I enclose herewith application for admission of Mrs. Annie E. Hurst to Marshall Square Sanitarium" (Props.' Ex. 4, R. 716a).

Mrs. Hurst's physician, who received the $5,000 pecuniary legacy, did testify that Mrs. Hurst seemed normal to him on December 1 and December 3, 1949, but on December 12 he discovered that she suffered from advanced cerebral arteriosclerosis, and he then found her seriously disoriented (R. 438a, 455a-463a).

The Orphans' Court and the Supreme Court of Pennsylvania found that Mrs. Hurst was mentally weak on December 2, 1949. Under the law of Pennsylvania, one who stands in a confidential relationship to a testatrix who suffers from mental infirmity, and who benefits under her will, has the burden of dispelling a presumption that he exerted undue influence. The Orphans' Court and the Supreme Court of Pennsylvania found that Alker's testimony failed to dispel that presumption. Alker, who had been Winfred Hurst's attorney before his death, and who was trustee of a $100,000 fund for Mrs. Hurst's support, was the only person who knew the nature and extent of Mrs. Hurst's estate. Mrs. Hurst had become dependent upon her son. On his death in November, 1949, she had no family on which to rely. Within a few weeks of her son's death, the will was executed. Alker, then a near-stranger to Mrs. Hurst, dictated the will. Already her trustee, her attorney, and her scrivener, he became by that will, her executor and chief beneficiary.

Alker made a vague assertion that Mrs. Hurst had a list of her assets and that "we looked up the values" (R. 633a). He never produced the list. He admitted that he did not ask Mrs. Hurst about the possibility of gifts to her church or to charity (R. 653a); that he did not ask her why she wanted to benefit him (R. 625a); that he did not inquire whether she had made an earlier will (R. 630a); and that he did not suggest that another lawyer might be requested to draw the will (R. 654a). Asked why he did not bring in another lawyer, he replied (R. 656a-657a) "I think if I had done that, that would be the end of things." He disavowed knowledge of a practice among lawyers to bring in outside counsel when a client wants to designate his lawyer as residuary legatee.

The Orphans' Court and the Supreme Court of Pennsylvania found Alker's testimony unbelievable. Not only was it inherently weak and contradicted; it was shaken by extrinsic proof of Alker's disbarment by the Orphans'

Court of Philadelphia County (**In Re Alker, Jr.**, 16 D. & C. 2d 653 (1959), aff'd 398 Pa. 188) and Montgomery County, and of his convictions for fraudulent evasion of income tax (aff'd in **United States v. Alker**, 260 F. 2d 135 (3d Cir., 1958)) and of taxes due on the estate of Winfred Hurst (R. 722a-725a); Conts.' Exs. 8-10C (R. 751a-789a).[2]

There is no occasion for a review of these findings by this Court. These findings have been made by two state courts; they are supported by the record; they involve no disputed questions of law.

2. No genuine federal question is presented in this case. Petitioner's belated claim that the courts of the state were prejudiced against him rests on nothing more than a contention that the testimony, fairly viewed, required a decision in his favor. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error" (**Graver Mfg. Co. v. Linde Co.**, 336 U. S. 271, 275 (1949).

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2. After the trial of the present case, Alker's conviction for estate tax evasion was set aside by the District Court because it appeared to the Court that some of the jurors had known about Alker's prior conviction for tax evasion (**United States v. Harry J. Alker, Jr.**, Criminal No. 18,730, U. S. Dist. Ct., E. D. Pa., December 3, 1959). Ultimately, the indictment was dismissed on motion of the United States Attorney, who said: "My reasons for moving for dismissal are: Under Indictment No. 18306 Alker was sentenced to the custody of the Attorney General for a period of a year and a day. As a result of this conviction, the defendant was disbarred by the Supreme Court of the Commonwealth of Penna. and by the Supreme Court of the United States. He is now approximately 76 years of age and in ill health. The ends of justice have been adequately served by Alker's conviction under Indictment No. 18306."

CONCLUSION.

The judgment of the Orphans' Court and the Supreme Court of Pennsylvania rests upon findings of fact well supported by the evidence, and the issues involve no question of federal law. We respectfully urge that the petition for certiorari be denied.

Respectfully submitted,

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